

**G. T. Knight Company, Incorporated and Oregon, Southern Idaho, Wyoming & Utah, District Council of Laborers, Laborers' International Union of North America, AFL-CIO. Case 36-CA-3953**

28 December 1983

## SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS  
ZIMMERMAN AND HUNTER

On 25 August 1983 Administrative Law Judge Richard D. Taplitz issued the attached decision. The General Counsel filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order.

## ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, G. T. Knight Company, Incorporated, Lake Oswego, Oregon, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

## SUPPLEMENTAL DECISION

### STATEMENT OF THE CASE

RICHARD D. TAPLITZ, Administrative Law Judge: This supplemental proceeding was heard at Portland, Oregon, on June 15, 1983. A second amended backpay specification dated April 21, 1983, from which certain provisions were stricken upon motion of the General Counsel at the hearing, was predicated on a Decision and Order of the Board dated June 21, 1982 (262 NLRB 328).<sup>1</sup> By stipulation dated October 12, 1982, Respondent stated that it would not appeal the Board's Order and agreed that the Regional Director might issue a backpay specification. It was further agreed that in the event judicial proceedings were necessary to enforce or review the Board's backpay determination, the only issue before the court would be the validity of the Board's backpay determination.

Upon the entire record<sup>2</sup> and from my observation of the witnesses, I make the following

<sup>1</sup> That decision and order was a summary judgment upon Respondent's failure to file an answer to the complaint.

<sup>2</sup> Errors in the transcript have been noted and corrected.

## FINDINGS OF FACT

### *A. The Board's Decision and Order, the Failure to File a Timely Answer to the Second Amended Backpay Specification, and the Motion for Summary Judgment*

In its Decision and Order the Board found, inter alia, that G. T. Knight Company, Incorporated (Respondent) violated Section 8(a)(5) and (1) of the Act by ceasing to make monetary contributions to health and welfare, pension, training, construction industry advancement fund, and vacation funds required by its contract with Oregon, Southern Idaho, Wyoming & Utah, District Council of Laborers, Laborers' International Union of North America, AFL-CIO (the Union). As part of the remedy the Board ordered Respondent to pay all contributions to the trust funds as provided in the contract which would have been paid absent Respondent's unlawful discontinuance of such payments. With regard to the payment of interest the Board held:

Because the provisions of employee benefit fund agreements are variable and complex, the Board does not provide at the adjudicatory stage of a proceeding the addition of interest at a fixed rate on unlawfully withheld fund payments. We leave to the compliance stage the question whether Respondent must pay any additional amounts into the benefit funds in order to satisfy our "make-whole" remedy. These additional amounts may be determined, depending on the circumstances of each case, by reference to provisions in the documents governing the funds at issue and, where there are no governing provisions, to evidence of any loss directly attributable to the unlawful withholding action, which might include the loss of return on investment of the portion of funds withheld, additional administrative costs, etc., but not collateral losses. See *Merryweather Optical Company*, 240 NLRB 1213 (1979).

The Regional Director issued a backpay specification on January 31, 1983, an amended backpay specification on March 4, 1983, and a second amended backpay specification on April 21, 1983.<sup>3</sup> Though the second amended backpay specification issued on April 21, 1983, Respondent failed to answer prior to June 15, 1983, the date the hearing opened. By motion dated May 20, 1983, the General Counsel sought an order precluding Respondent from introducing any evidence concerning the backpay specification. That motion was supported by an affidavit of counsel for the General Counsel which stated that no answer had been filed to the backpay specification and that on May 9, 1983, counsel for the General Counsel had been informed by Respondent's attorney that Re-

<sup>3</sup> At the hearing the General Counsel successfully moved, without opposition from Respondent, to delete par. 9(b) from the second amended specification. Par. 9(b) alleged that Respondent was obligated to make contributions to the trust funds from February 28, 1983, until May 31, 1983. In effect, the amendment reduced the backpay period alleged in the specification by changing it from February 10, 1981, through May 31, 1983, to February 10, 1981 through February 28, 1983.

spondent would not answer the backpay specification as amended because Respondent did not have any funds. By order dated June 7, 1983, counsel for the General Counsel's motion was referred for disposition to the administrative law judge designated to conduct the hearing.

At the opening of the hearing Respondent offered in evidence an answer to the second amended backpay specification. In effect, Respondent moved for permission to serve a late filed answer. After hearing argument on that motion, I found that no good cause had been shown for the failure to timely file the answer. I denied the motion and rejected the late filed answer. In the absence of a timely filed answer, counsel for the General Counsel moved for summary judgment. I granted that motion for summary judgment in part. Pursuant to Section 102.54<sup>4</sup> of the Board's Rules, I found that the specifications were true and that factual findings based on those specifications would be made. However, as I was of the opinion that further consideration was needed with regard to the allegation in the specifications that liquidated damages, interest, and attorney's fees were due, I held that I would permit the parties to introduce evidence with regard to those three matters on which a legal determination could be made as to the appropriateness of those specific remedies.

Appendix I of the second amended backpay specification sets forth the amount claimed as follows:

Trust Fund Contributions for the Period February 10, 1981, Through December 31, 1981 .....	\$6,734.46
Liquidated Damages for the Period February 10, 1981, Through December 31, 1981 .....	\$1,134.88
Trust Fund Contributions Overdue for the Period January 1, 1982, Through April 30, 1982 .....	0
Fund Contributions for the Period May 1, 1982, Through February 28, 1983 .....	\$7,196.27
Liquidated Damages for the Period May 1, 1982, Through February 28, 1983 .....	\$1,150.31
Attorneys Fees Spent to Date by the Trust to Collect Past Due Trust Contributions .....	\$ 4,000.00
<b>Total Owning .....</b>	<b>\$20,215.92</b>
<b>Less Respondent's Payments to Date<sup>1</sup> .....</b>	<b>\$3,800.00</b>
<b>Backpay Due for Delinquent Contributions Through February 28, 1983 .....</b>	<b>\$16,415.92</b>

<sup>1</sup> Pursuant to a Settlement Agreement between the parties herein, Respondent agreed to apply \$1,200 of the \$5,000 paid to the Trust as referenced in paragraph 7 herein for contributions owed by Respondent prior to the backpay period herein.

Paragraph 10(a) of the second amended backpay specification states in part:

(a) Summarizing the facts and calculations specified above, and detailed in Appendix I, the obligation of

<sup>4</sup> Sec. 102.54(a) states that an answer must be filed within 15 days from the service of the specification. Sec. 102.54(c) provides:

(c) *Effect of failure to answer or to plead specifically and in detail to the specification.*—If the respondent fails to file any answer to the specification within the time prescribed by this section, the Board may, either with or without taking evidence in support of the allegations of the specification and without notice to the respondent, find the specification to be true and enter such order as may be appropriate. . . .

Respondent, under the Board's Order to, inter alia, make whole its employees by applying all contributions to the Trust funds identified above in paragraph 4, plus attorneys' fees, liquidated damages and interest thereon from February 10, 1981, to February 28, 1983, is \$16,415.92.

The General Counsel seeks 12-percent-per-annum interest. It appears from paragraph 10(a) that the 12-percent-per-annum interest has already been included in the \$6,734.46 figure for February 10, 1981–December 31, 1981, and in the \$7,196.27 figure for May 1, 1982–February 28, 1983.

The backpay specification as amended is extremely conclusionary with regard to the amount due. There is no indication of the names of employees on whose account the money is due to the funds, of the number of hours worked upon which the computations are made, or of the amount attributed to interest. Such an approach makes it more difficult to achieve a settlement and also presents problems in litigation.

The General Counsel also seeks 12-percent liquidated damages. Assuming there are liquidated damages due to both the principle and interest to December 31, 1981, 12 percent liquidated damages on \$6,734.46 would be \$808.14 and not \$1,134.88. Twelve percent of the \$7,196.27 for May 1, 1982–February 28, 1983, would be \$863.55 and not \$1,150.31. Presumably the General Counsel has added interest to the liquidated damages.

In partially granting the motion for summary judgment, I find that the figures set forth in that Appendix are accurate and show the amount due, except for the question of whether the liquidated damages, interest, and attorney's fees are legally chargeable to Respondent, and whether the 12 percent liquidated damages were properly computed.

#### B. The Liquidated Damages and Interest

The remedy set forth in the Board's Order, which is quoted above, provides that the Board's usual formula for setting a fixed interest rate on backpay will not be used with regard to unlawfully withheld fund payments and that the documents governing the funds at issue may be used to determine additional amounts needed to satisfy the make-whole remedy. The relevant document in this case is the trust agreement—Oregon Laborers-Employers Trust Funds, amended and restated effective September 1, 1979.

Section 4.04 of that document states:

4.04 Liquidated Damages and Interest. The parties recognize and acknowledge that the regular and prompt filing of employer reports and the regular and prompt payment of employer contributions to the Fund is essential to the maintenance in effect of the Pension Plan, and that it would be extremely difficult, if not impracticable, to fix the actual expense and damage to the Fund and to the Pension Plan which would result from the failure of an individual Employer to make such reports and to pay such monthly contributions in full within the time provided above.

Therefore, the amount of damage to the Fund and Pension Plan resulting from failure to make reports or pay contributions within the time specified shall be presumed to be the sum of 12 percent of the amount of the contribution or contributions due for each delinquent report or contribution. These amounts shall become due and payable to the Fund as liquidated damages and not as penalty, upon the day immediately following the date on which the report or the contribution or contributions become delinquent. However, the Trustees, in their discretion, for good cause (and the Trustees shall have the sole right to determine what shall constitute good cause) shall have the right and power to waive all or any part of any sums due the Fund as liquidated damages. Any delinquent amounts hereunder shall bear interest at the rate of 12 percent a year.

Frank Hastie is a trust coordinate and a management trustee for the funds in question. He testified that the 12-percent charge for liquidated damages covers expenses to the trust relating to administration or internal overhead which is created by the need to collect delinquencies. He averred that the trust administrator has a staff of three employees on a full-time basis whose work is related to delinquencies, and that the liquidated damages go toward paying those administrative costs. As to the 12-percent-per-year interest he testified that the interest payments are to recoup the loss to the trust fund on interest that it would have earned on the contributions if the contributions had been made in a timely manner and invested. He further averred that the interest rate of 12 percent was set to approximate the average return the trust would have received on those moneys.

In *Longshoremen Local 1593 (Caldwell Shipping Co.)*, 243 NLRB 8 (1979), enfd. 644 F.2d 408 (5th Cir. 1981), the Board found that trust funds were entitled to be compensated "for administration costs and other expenses and loss of interest incurred by the Fund as the result of its acceptance of the retroactive fringe benefit payments." Where, as here, liquidated damages have been agreed to by the parties and where such damages appear to be related to additional costs to the fund rather than to penalizing the delinquent employer, it is appropriate to require the employer to pay such damages. *Peerless Roofing Co.*, 247 NLRB 500, 504-505 (1980), enfd. 641 F.2d 734 (9th Cir. 1981). I therefore find that the liquidated damages of 12 percent are due. As is set forth above, 12 percent of the \$6,734.46 for the period February 10, 1981-December 31, 1981, is \$808.14. Twelve percent of the \$7,196.27 for the May 1, 1982-February 28, 1983, period is \$863.55.

Based on the language of the contract and the testimony of Hastie, it appears that the 12-percent-per-annum interest rate specified in the agreement for delinquent payments directly relates to the loss of return on investment of the portion of funds withheld. Such interest is necessary to satisfy the make-whole remedy. As the \$6,734.46 and \$7,196.27 figures include interest through February 28, 1983, I find that interest at a rate of 12 percent per annum is due on the delinquent trust fund contributions

from February 28, 1983, until the contribution is actually made. As the trust agreements provide for the 12-percent-per-year interest on "delinquent amounts," interest is to be paid only on such delinquent amounts and not to the liquidated damages which are assessed on those delinquent amounts.

### C. The Attorney's Fees

Section 4.03 of the trust agreement provides:

4.03 Default in Payment. The failure of an Employer to pay the contribution required hereunder at the times and in the manner required by the Trustees shall constitute a violation of such Employer's obligations hereunder. Non-payment by an Employer of any contribution as herein provided shall not relieve any other Employer of his obligation to make payment of his required contribution. The Trustees may take any action necessary to enforce payment of the contributions due hereunder, including the right to sue such Employer in a state court of competent jurisdiction; and the delinquent Employer shall be liable to the Trust for all expenses of collection thereof, including actual attorney's fee, incurred by the Trustees.

Trust coordinator Hastie testified that attorney's fees are fees that a legal firm bills for handling delinquencies and that they are not part of the administrative expenses referred to in connection with liquidated damages.

The trust agreements provide for the payment of actual attorney's fees. There is nothing in the record to indicate litigation other than that in the Board proceedings and the attorney's fees appear to relate to the attorney's representation of the Union in these Board proceedings. Respondent might well be entitled to attorney's fees in a civil breach of contract suit brought in a state or Federal district court.<sup>5</sup> However, this is not a civil breach of contract suit. The Board has no authority to require payments to be made under a contract as such. It is only when a contract breach undermines the collective-bargaining relationship in such a way that there is a refusal to bargain in violation of Section 8(a)(5) of the Act that the Board can find a violation and give a remedy.<sup>6</sup> In remedying such refusals to bargain as well as other violations of the Act, the Board has been very circumspect in awarding attorney's fees to the charging party. See, for example, *Farren's Tree Surgeons, Inc.*, 264 NLRB 668 (1982); *Heck's Inc.*, 215 NLRB 765 (1974). In view of the Board's hesitancy in awarding attorney's fees, I am unprepared to interpret the general language of the Board in this case in such a manner as to authorize the payment of attorney's fees. I am bound and limited by the Board's Order in remedying this case and in view of the past practices of the Board, I do not believe that

<sup>5</sup> Sec. 301(a) of the Act provides that suits for violation of contracts between employers and unions may be brought in United States district court.

<sup>6</sup> As the United States Supreme Court held in *NLRB v. Fant Milling Co.*, 360 U.S. 301, 307-308 (1959): "The Board was created not to adjudicate private controversies but to advance the public interest in eliminating obstructions to interstate commerce . . . ."

the language in the Board's ordinary remedy can be fairly read to require the payment of attorney's fees, which is extraordinary relief. I therefore find that attorney's fees are not due and owing.

#### *D. Conclusions*

I find that Respondent's obligation to the trust funds will be discharged by the payment to the funds of \$11,802.42,<sup>7</sup> plus interest at the rate of 12 percent per annum on delinquent amounts other than liquidated damages, from February 28, 1983, until the date this Decision is complied with.

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<sup>7</sup> That figure is computed as follows: Trust fund contributions and interest for February 10, 1981, through December 31, 1981: \$6,734.46; liquidated damages for that period: \$808.14; trust fund contribution and interest for May 1, 1982, through February 28, 1983: \$7,196.27; liquidated damages for that period: \$863.55; minus Respondent's payments to date of \$3,800.

On the basis of the foregoing findings of fact and conclusions and on the entire record of this proceeding, I issue the following recommended

#### **ORDER<sup>8</sup>**

The Respondent, G. T. Knight Company, Incorporated, Lake Oswego, Oregon, its officers, agents, successors, and assigns, shall

Satisfy its obligation to the trust funds described above by payment to those funds of \$11,802.42, plus interest at the annual rate of 12 percent, in the manner set forth in the section of this Decision entitled "Conclusions."

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<sup>8</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.